Enforceability of Mediated Agreements

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INTRODUCTION

Parties have been settling disputes without court intervention for hundreds of years.[1] This phenomenon has been unified recently in the dispute resolution movement. However, the enforceability of settlement agreements is not a settled issue.[2] This uncertainty could block a more widespread use of mediation,[3] especially when the determination of a court is already universally accepted as enforceable.[4] This Article examines the issues surrounding the enforceability of mediated agreements.

I. VOLUNTARY COMPLIANCE

Disputants are nearly twice as likely to comply voluntarily with mediated agreements than with court-imposed judgments.[5] The reason for this phenomenon stems from the fact that the legitimacy of a court decision "depends on an explicit reasoned connection between the result and a general rule,"[6] while a consensus between the parties often produces a sense of fairness which is frequently not as readily apparent in the judicial arena.[7] Mediated agreements are more likely to reflect what the parties want or are willing to accept because their idiosyncrasies can be incorporated into the agreement.[8] Guarantees backed by personal honor "may . . .

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1. *See* H. GLICK, COURTS, POLITICS & JUSTICE 119-22 (1983); E. JOHNSON, V. KANTON & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES 1, 4-6 (1977); H. JACOB, JUSTICE IN AMERICA: COURTS, LAWYERS & THE JUDICIAL PROCESS 200, n.7 (3d ed. 1978).

2. *See generally* Cappelletti & Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFFALO L. REV. 181 (1978).

3. Hileman, *Environmental Dispute Resolution*, 17 ENVTL. SCI. & TECH. 165A (1983).

4. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1084-85 (1984).

5. McEwen & Maiman, *Mediation in Small Claims Courts: Achieving Compliance Through Consent*, 18 LAW & SOC. REV. 11, 11 (1984). (Eighty percent of mediated parties who agreed to perform some obligation for another party fully complied with that obligation within 6-18 months. This figure compares to a 44.5% rate for adjudicated defendants who had a judgment rendered against them. Failure to perform even partially was found to be about four times more likely in adjudicated than in mediated cases.)

6. W. DEJONG, G. GOOLKASIAN, & D. MCGILLIS, THE USE OF MEDIATION AND ARBITRATION IN SMALL CLAIMS DISPUTES 41 (1983).

7. McEwen & Mainman, *supra* note 5, at 40.

8. For a detailed explanation of how to draft mediated agreements in order to encourage voluntary compliance, *see* Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754

structure later behavior in accordance with prior commitments, as may the possibility of embarrassment. These overlapping pressures presumably work independently of formal controls emanating from the courts."[9]

Some parties, though, will fail to comply with the provisions of their mediated agreements. Alternatives to remedy such noncompliance include ignoring the breach, attempting renegotiations, and enforcing court orders.[10] This last alternative raises the issue of the enforceability of mediated agreements.

II. COURT ENFORCEMENT OF MEDIATED AGREEMENTS

A. *Need for an Enforcement Theory*

Whether a court of law will enforce a mediated agreement is integral to the mediating parties. When one party breaches its duties, the aggrieved party may wish to hold the breaching party to the terms of the mediated agreement.[11] Alternately, many parties refuse to mediate because they do not want to devote time to drawing up a non-binding agreement.

Mediated agreements may already be enforceable, especially in the five jurisdictions that have taken a position on the enforcement issue.[12] However, in the other jurisdictions where no controlling

(1984); Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement & Rulemaking*, 89 HARV. L. REV. 637 (1976); Wheeler, *Environmental Disputes: The Problem of Enforcing Negotiated Agreements*, in *A Study of Barriers to the Use of Alternative Methods of Dispute Resolution*, 74 (Vermont Law School Dispute Resolution Project ed. 1984).

9. McEwen & Maiman, *supra* note 5, at 43.

10. Freedman, Legal Issues in Mediation: Are Mediation Agreements Enforceable 3 (1984) (unpublished manuscript available from The American Bar Association, Special Committee on Dispute Resolution, Washington, D.C.).

11. In the words of Adam Smith, "The foundation of contract is the reasonable expectation, which the person who promises raises in the person to whom he binds himself; of which the satisfaction may be extorted by force." A. SMITH, LECTURES ON JUSTICE, POLICE, REVENUE, & ARMS 7 (Cannan ed. 1896) *cited in* Kessler & Sharp, *Contract as a Principle of Order*, Chapter 24 IN: SOCIETY & THE LEGAL ORDER at 156 (Schwartz & Skolnick eds. 1970).

12. The Neighborhood Justice Center in Atlanta, Georgia informs its participants that a mediated agreement will be upheld by a court as a valid contract. Freedman, *supra* note 10, at 15. Statutes in the State of New York authorize the incorporation of mediated agreements into enforceable arbitration awards. *Id.* In 1973, the State of Colorado enacted House Bill 1506, § 13-22-308 which provides that any mediated agreement reduced to writing and approved by a court "shall be enforceable as an order of the court." *See also Model State Legislation on Mediation*, in LEGISLATION ON DISPUTE RESOLUTION 290-296 (ABA Special Committee on Dispute Resolution ed. 1984). If a mediated agreement is approved by a court in Arizona, the agreement is considered binding. The same is true in the District of Columbia so long as the agreement is free of fraud, improper awards, or gross arbitrator conduct. *Id.* at 251.

law exists, courts may be uncertain whether to enforce the mediated agreement.[13]

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13. Any state will bind parties to a true accord and satisfaction or substitute agreement. The problem lies in convincing the court that a mediated agreement qualifies for enforcement. If the agreement itself provides that it operates as a discharge of an existing claim, the agreement can qualify as a substituted contract. 6 CORBIN ON CONTRACTS § 1269 (1962). If it is not agreed at the time of creating the agreement that the promises contained in the agreement are accepted as a proper discharge of prior claims, the agreement will constitute only an executory accord, i.e., the prior claim is intended to be discharged only when the compromise performance is rendered. *Id.* at § 1268. In other words, if one party promises to forbear suing another party if the other promises to do something, it seems as if the parties intend that the potential plaintiff's claim and the potential action are to be discharged only when the other *does what* he promises. "[I]t is the 'performance' of the compromise that is to operate as final satisfaction. If the debtor breaks the compromise agreement, the suspension [of prior claims] is lifted and the creditor can again enforce his former claim." *Id.*

Compromises are frequently specifically enforced without any discussion of whether only an executory accord or an actual substituted agreement is involved. *Id.* citing Moers v. Moers, 128 N.Y. 294, 128 N.E. 202 (1920) (the court specifically enforced an accord executory describing it, however, as a substituted contract). The distinction between an executory accord and a substituted contract is based on a question of fact and determination of the parties' intentions. J.CALAMARI & J. PERILLO, CONTRACTS § 21-6 (2d. ed., 1977). However,

> The more deliberate and formalized the agreement, the more likely the parties intended to substitute the present agreement for prior claims. Goldbard v. Empire State Mut. Life Ins. Co., 5 A.D.2d 230, 171 N.Y.S.2d 194 (1st Dep't 1958). In cases involving liquidated undisputed obligations, however, it will generally be presumed that the creditor did not intend to surrender his prior rights unless and until the new agreement is actually performed.

Id. See also Clark v. Elza, 286 Md. 208, 215, 406 A.2d 922 (1979) (a release of claims made at the time the agreement is made is evidence that the new agreement was designed to be a substituted contract).

If all the elements of a true substituted contract exist, i.e., the parties intend that the new agreement constitutes a substitute for prior claims and the substituted contract immediately discharges the original claim, *Clark* 286 Md. at 214, two events could occur. If the original wrongdoer complies with the new agreement, the underlying breach will be subsumed within the new contract and the original victim cannot sue, as that would breach the substituted contract. *See* 6 CORBIN ON CONTRACTS § 1274 (1962): "As long as the debtor has committed no breach of the accord, therefore, the creditor should be allowed to maintain no action for the enforcement of the prior claim." If the original wrongdoer does not comply with the substituted contract, he can be required by a court to specifically perform it under threat of jail or other contempt powers.

Even if the mediated agreement does not qualify as a substituted contract, i.e., the parties did not specifically intend for the *promises* contained in the agreement to discharge prior claims and expected only the promised *performance* to act as a discharge, executory accords are still enforceable. 286 Md. 208. The *Clark* court held that even though the promised performance has been completed, the prior victim could not sue the prior wrongdoer for the prior claim sought to be settled in the executory accord unless the other party breaches the accord or gives the prior victim reason to believe prospective nonperformance is inevitable. *See*

Professor Fiss[14] warns that a judge will have no basis for assessing requests related to mediated agreements because reconstruction of the factual and legal situation as it existed at the time the agreement was entered into would border on the absurd.[15] Although Professor Fiss' criticism justifies enforcement of the original mediated agreement, it improperly assumes that courts do not currently engage in reconstructing other disputes. Rather, courts often reconstruct a disputed contract during litigation. Therefore, a court's treatment of mediated agreements as contracts may clarify the questions surrounding the enforceability of mediated agreements.

An enforceable mediated agreement is beneficial because it assures disputants that their resolution in the mediation is final, and avoids the burden and expense of litigating the underlying liabilities and claims finalized by the agreement.

B. *Enforcing Mediated Agreements as Contracts*

If a party seeks to enforce a mediated agreement as a contract, it must meet all of the common law elements of an enforceable contract.[16] Several of these common law elements, such as mutual

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RESTATEMENT OF CONTRACTS § 417 (1932) regarding a contract to accept a stated performance in satisfaction of a duty to make compensation:

(a) Such a contract does not discharge the duty, but suspends the right to enforce it as long as there has been neither a breach of the contract nor a justification for the creditor in changing his position because of its prospective non-performance.

(b) If such a contract is performed, the previously existing duty is discharged.

(c) If the debtor breaks such a contract the creditor has alternative rights. He can enforce either the original duty or the subsequent contract.

The author assumes that the difficulty of establishing a true substituted contract, the ability to sue on the original claim or "the subsequent contract" (if one established only an executory accord), or the theory's reliance on contract principles will inevitably necessitate discussion of contract law and whether the mediated agreement qualifies as an enforceable contract.

14. Fiss *supra* note 4, at 1083.

15. *Id.* at 1084.

16. Enforceable contracts require an offer. RESTATEMENT (SECOND) of CONTRACTS §§ 17 *et seq.* (1979); 17 AM. JUR. 2d *Contracts* §§ *31 et seq.* (1964). This is typically viewed as a proposition generated by one of the parties to the contract, but the fact that a term is suggested by a third party, such as a mediator, does not create a barrier to enforcement. The parties themselves modify and finalize all proposed terms and thereby may be seen as adopting the mediators's suggestions as their own.

Enforceable contracts require acceptance. RESTATEMENT (SECOND) OF CONTRACTS §§ 50 *et seq.* (1979); 17 AM. JUR. 2d *Contracts* §§ 41 *et seq.* (1964.) This term implies a voluntary meeting of the minds and will be discussed in the context of freely and knowingly consenting to the agreement's terms. *See* text, *infra*

assent, consideration, compliance with public policy, appropriate authority, lack of mistake, and impossibility pose barriers to persuading a court to enforce a mediated agreement as a contract.

1. *Mutual Assent*

To establish a contract, both parties must voluntarily assent to its proposed terms. Undue influence or coercion that sufficiently taints the validity of the consent can make the agreement voidable.[17]

Although moral pressures and disparities in power and resources may affect the consent requirement, the courts nevertheless tolerate a significant degree of constraint without earmarking a contract voidable for lack of voluntary consent. The legal standard is that each party's consent was given with the full knowledge that each retained the alternative to refuse. Consent given, no matter how grudgingly, with the knowledge that it could have been withheld, leaves intact the validity of the contract.[18] If the voluntary consent element of the contract is subsequently challenged in court, the law imposes on the promisor the burden of proof to demonstrate that the agreement was created without undue influence or coercion.[19]

Imbalanced bargaining power and unequal transaction costs between the mediating parties can threaten the voluntariness of the consent given by the parties. This inequality is predominant in

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pp. 187-188 and accompanying notes 17-23 for mediation-specific concerns.

Enforceable contracts require consideration. RESTATEMENT (SECOND) OF CONTRACTS §§ 71 *et seq.* (1979); 17 AM. JUR. 2d *Contracts* §§ 85 *et seq.* (1964.) *See* text, *infra*, pp. 189-190 and accompanying notes 24-32 for mediation-specific concerns.

Enforceable contracts require appropriate authority of each signatory to bind the entity being represented. 3 AM. JUR. 2d *Agency* §§ 311 *et. seq.* (1964); 17 AM. JUR. 2d. *Contracts* § 294 (1964). See text, *infra*, pp. 192-193 and accompanying notes 41-42 for mediation-specific concerns.

Enforceable contracts also require legal capacity of the parties, RESTATEMENT (SECOND) OF CONTRACTS §§ 12 *et seq.* (1979); 17 AM. JUR. 2d *Contracts* § 16 (1964) and a writing wherever required by law. RESTATEMENT (SECOND) OF CONTRACTS §§ 110 *et seq.* (1979); 17 AM. JUR. 2d *Contracts* § 67.

Additionally, if any of the following conditions are present, the contract will not be enforceable: fraud, misrepresentation, duress, and undue influence, RESTATEMENT (SECOND) OF CONTRACTS §§ 159 *et seq.* (1979); 17 AM. JUR. 2d *Contracts* §§ 151-154 (1964).

17. RESTATEMENT (SECOND) OF CONTRACTS §§ 175 (duress makes a contract voidable) and § 177 (undue influence makes a contract voidable); 17 AM. JUR. 2d *Contracts* §§ 151-54 (1964).

18. McEwen & Maiman, *supra* note 5, at 13.

19. CORBIN ON CONTRACTS § 749 (1952).

domestic violence cases in which a pattern of dominance of one spouse over the other has already been established.[20] It is also predominant in environmental disputes which frequently pit large corporations against local landowners.[21]

Some inspection of the consent obtained in the mediation setting may be necessary to insure a fair result.[22] It is difficult to create standards that safeguard the fairness of the bargaining process. One problem is that standards regulating the mediator's conduct, where they exist, do not give specific guidelines for determining proper mediator intervention in the bargaining process.[23] If a mediator makes no attempt to remedy imbalances between parties, lack of advice (legal or otherwise) may render an agreement unenforceable because consent given out of ignorance is not valid. Where, for example, one party has been able, with the mediator's acquiescence, to convince another to bargain away unknown rights, or where one party falsely indicates that he or she has given up a legal right to sue, the agreement could fail for lack of consent. Only if the mediator corrects any power or informational disparities that could potentially destroy the informed consent requirement should the resulting agreement be enforceable.

Thus, although mediation involves special consent concerns, a fairly bargained-for-agreement, properly supervised by a mediator sensitive to the necessity of obtaining voluntary consent by parties aware of the option to refuse, yields a valid and enforceable contract.

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20. *See* generally, L. Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues in the Courts and Legislatures,* National Center on Women and Family Law (1985).

21. RESOLVING ENVIRONMENTAL REGULATORY DISPUTES (L. Susskind, L. Bacow, and M. Wheeler eds. 1984) at 1. Although the editors recognize that no two companies have the same resources to draw upon in negotiation, they nevertheless advocate the use of informal dispute resolution methods to solve environmental regulatory disputes. The seven case studies in the book examine the obstacles to informal conflict resolution in this area. Also, *see* J. MARKS, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION (1984) at 6.

22. Goetz & Scott, *Liquidated Damages, Penalties & The Just Compensation Principle: Some Notes on an Enforcement Model & A Theory of Efficient Breach,* 77 COLUM. L. REV. 554, 593-4 (1977); *see also* 9 U.S.C. §§ 10(b)-10(c) (1976) federal arbitration award vacated only

> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
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> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

23. *See e.g., Code of Professional Conduct for Mediators,* (adopted by the Colorado Council of Mediation Organizations April 5, 1982) in which the responsibility

2. *Consideration*

To establish a contract, the parties must show that they exchanged adequate consideration.[24] The Restatement (Second) of Contracts, section 74, considers even a forbearance to assert a claim or defense adequate consideration if the claim or defense is valid or asserted in good faith.[25] The consideration requirement is worth studying in the mediation context, because the underlying dispute may involve unclarified rights, claims, or interests.[26]

If, for example, a consumer buys a car that has needed repeated servicing, the consumer may have a claim against the manufacturer depending on the nature of the problem involved. If the manufacturer could in any way be held liable for a defect, the consumer's forbearance in filing suit is still consideration under the Restatement theory since the consumer is surrendering a claim that could be asserted in good faith. If the manufacturer clearly is not responsible, the consumer cannot assert a claim for liability. Therefore, the consumer's forbearance to sue would not be valid consideration. Regardless of the facts, a manufacturer may be motivated to settle the dispute in order to maintain a favorable reputation.

A court will generally respect a contract that the parties deem to be reasonable[27] and thus will not assess the adequacy of the con-

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of the mediator is defined:

> A mediator is obliged to educate the parties . . . [and] must not consider him or herself limited to keeping the peace or regulating conduct at the bargaining table . . . [and] should be . . . [an] active resource person . . . prepared to provide both procedural and substantive suggestions . . . . In the event a party needs additional information or assistance in order for the negotiations to proceed in a fair and orderly manner or for an agreement to be reached that is fair, equitable and has the capacity to hold over time, the mediator is obligated to refer the party to resource . . . . At no time will a mediator offer legal advice to parties in dispute.

24. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1979): If the requirement of consideration is met, there is no additional requirement of
(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promissee; or
(b) equivalence in the values exchanged; or
(c) "mutuality of obligation."

25. E. FARNSWORTH & A. MCCORMACK, CONTRACTS § 2.12.

26. Professor Farnsworth notes that, if the claim or defense is doubtful because of the claimant's subjective uncertainty as to the facts or law (as opposed to being truly an "unfounded" claim), the courts have diluted the claim requirement to find adequate consideration. *Id.* at 71, (citing RESTATEMENT (SECOND) OF CONTRACTS § 74(1)(b) (1979).

27. Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207,229 (1982): "[U]nder contract norms the law should not review the adequacy of the consideration, but should defer to the judgment of the

sideration exchanged.[28] A court that might otherwise decline to enforce a mediated agreement because the underlying claim is invalid and consideration is lacking,[29] may still enforce the agreement, recognizing that the promisor is bargaining for peace of mind. Professor Farnsworth comments that, "[the promisor] 'can hardly be heard to say that the claim . . . was obviously invalid and frivolous when it attached enough importance to it to make the contract in question.'"[30] The principle of freedom of contract coupled with the recognition that individuals are capable of assessing the value of their interests suggests that courts should respect the parties' mediated agreement.

Even if a claim asserted in good faith is later discovered to be invalid, it still may make sense to enforce a settlement based on that claim. In support of this contention, Professor Farnsworth explains:

> We ask not whether the claimant is barred from enforcing the underlying claim, but whether the claimant can enforce the promise made in settlement. The policy favoring such compromises of disputed claims suggests that the claimant be allowed to enforce the promise, even if his settled claim later proves to be invalid.[31]

Imposing consideration requirements on settlement agreements has been questioned by commentators and eliminated by some state legislatures.[32] Such statutes remove the concern that uncertain claims used as part of the consideration exchanged in negotiating a mediated agreement which endanger enforceability. Therefore, consideration should not present an obstacle to judicial enforcement of the mediated agreement, even though the value of the consideration may be difficult to ascertain.

3. *Public Policy*

Many courts favor voluntary agreements so highly that they generally will uphold them.[33] Efficiency interests are served by the enforcement of an agreed allocation of risks.[34] However, mediated agreements, like traditional contracts, will not be enforced if the

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parties," (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 79, 71, comment c [1981]).

28. R. POSNER, ECONOMIC ANALYSIS OF LAW 71 (1972).

29. FARNSWORTH, *supra* note 25, at § 2.12.

30. *Id.* at 72.

31. *Id.* at 69-70.

32. *Id.* at § 2.18.

33. *See e.g.*, Bergstrom v. Sears, 532 F. Supp 923 (D. Minn. 1982) (trial courts possess inherent power to enforce settlement agreements).

34. Schultz, *Contractual Ordering of Marriage; A New Model for State Policy*, 70 CAL. L. REV. 207, 219 (1982):

parties have agreed to violate the law or certain principles of public policy.[35]

Public policy can conflict in the area of mediation. On the one hand, society has an interest in resolving disputes within its system of formal litigation. On the other hand, the established legal system encourages compromise and settlement.[36] Mediation agreements terminate the need for litigation of the particular dispute. Public policy may affect the enforceability of a mediated agreement to the extent that a policy protects interests that extend beyond those of the immediate parties.[37]

A difficulty arises in determining when public policy is frustrated by a mediated agreement.[38] If, for example, parties have a common interest in protecting the confidentiality of the mediation sessions, they may include in their agreement a term providing that they will not subpoena the mediator in any later court proceedings arising from the agreement. Parties may be unwilling to initiate compromise discussions without such an assurance. Yet one party may argue in court that this provision infringes upon the policy of presenting all relevant evidence in legal proceedings.[39]

To resolve these conflicting directives, public policy should pro-

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Value choices would then be subjectively made, risks and obligations voluntarily assumed, and rights and goals individually selected. Once these individual choices were made in ways that satisfied the safeguarding criteria . . . , a state choice, to allow contractual ordering would mean that public enforcement within traditional limits would be accessible to a party aggrieved by nonperformance of privately determined obligations.

This reduces transaction, error, and direct costs of litigating the original dispute.

35. *See generally* 17 AM. JUR. 2d. *Contracts* §§ 155, 156, and 216 (1964).

36. It is the policy of the law to encourage compromise and settlement. *See In re* General Motors. Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.) *cert. denied*, 444 U.S. 870 (1979); FED. R. EVID. 408 advisory committee note; 6 CORBIN ON CONTRACTS § 1268 (1962); 15A AM. JUR. 2d. *Compromise & Settlement* § 5 (1964) and cases listed therein.

37. Goetz & Scott, *supra* note 22, at 527.

38. *See supra* note 36. One example of difficulties inherent in resolving such competing policies is manifested in FED. R. EVID. 408 (1975). In federal court litiagation, this rule excludes evidence of the offer or acceptance of "a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount. . . [but] does not require exclusion of any evidence otherwise discoverable. . . [nor any evidence] offered for another purpose." *Id.* One public policy encouraging compromise conflicts with another public policy encouraging presentation at trial of all relevant evidence (embodied in FED. R. EVID. 402) "to the end that the truth may be ascertained." FED. R. EVID. 102 (1975).

39. *See supra* note 38.

hibit parties from resolving a particular question inconsistent with it only when the resolution of the dispute is controlled by statutes or precendent designed to achieve a goal beyond the interests of the parties to the mediation.[40]

Public policy therefore, can threaten the enforceability of certain provisions of a mediated agreement. This potential barrier, however, does not justify denying enforcement of mediated agreements which include terms that do not contravene public policy. Since public policy favors compromise, courts should uphold mediated agreements unless the particular term of a mediated agreement violates a public policy aimed at accomplishing more than justice between the parties. The determination may be made on a case-by-case basis as is customarily done when courts are called upon to enforce a contract. The validity of the mediated contract concept should not be threatened by this potential for abuse.

4. *Proper Authority*

In multi-party disputes, the issue arises whether the parties negotiating the mediated agreement have the authority to bind other parties affected by the agreement but not present during negotiations. This problem frequently arises in the context of environmental disputes.

The Grayrocks Dam controversy[41] is a classic example of a multi-party environmental dispute. In 1970, six utilities formed the Missouri Basin Power Project (MBPP), and advocated the construction of a $1.6 billion coal-fired electric power plant on the banks of Wyoming's Laramie River, a tributary of the North Platte River. To supply essential cooling water for the plant, MBPP proposed to build a dam and reservoir on the Laramie River. The dam and reservoir would divert 60,000 acre feet of water annually from the Laramie River, and thus from the North Platte River.

Many groups criticized the MBPP proposal. Conservationists feared the project would adversely affect the habitat of the whooping crane, an endangered species. Farmers downstream from the proposed project site objected to the construction because the dam would cut off the water supply they needed to irrigate their crops, thus jeopardizing their livelihoods. The State of Nebraska opposed the dam because the construction would force the state, which lies

40. Goetz & Scott, *supra* note 22, at 543.

41. This example is excerpted for L. BACON & M. WHEELER, *supra* note 21, 46-50 (1984).

downstream from the Wyoming project to reduce its water supply.

In light of these concerns, a mediated agreement should bind only the immediate parties to the agreement. The mediator can stress the parties' long-term interests in future compliance, thereby encouraging them to include all interested parties in the mediation. Nevertheless, the mediated agreement will not be enforced as a valid contract by a court if a careless mediator permits a mediated agreement to be signed by persons lacking proper authority to bind the necessary parties.[42] The proper authority requirement may be fatal to the enforceability of some mediated agreements.

5. *Mistake*

Contracts may be voided on the ground that, at the time of contract formation, a party made a mistake of law or fact, but claims of mistake are less tenable when enforcing mediated agreements. In traditional contract negotiations, the parties often deal with concrete facts and issues, for instance, price. Thus courts hold the contracting parties only to risks actually exchanged.[43] In mediation, negotiations frequently revolve around uncertain facts and issues. Courts should be less receptive to legal claims based on mistake, since parties to a mediation are aware of the inherent possibility of errors in judgment.

Many settlements are upheld in spite of mistakes as to law or fact, since, by settling, the parties have demonstrated a preference for reaching a final resolution over clarifying inaccuracies.[44] By agreeing to resolve a dispute in mediation, disputants are aware that a court could decide the dispute differently. As an incentive to mobilize mediation discussions, a mediator often will remind the parties that they can choose certainty be resolving their dispute, or risk the terms of that resolution by allowing a judge to intervene.[45] Professor Dobbs illustrates this point when he writes:

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42. CORBIN ON CONTRACTS § 598 (1952). Another example can be found in RESTATEMENT, RESTITUTION § 11(1): "A person is not entitled to rescind a transaction with another if, by way of compromise or otherwise, he agreed with the other to assume, or intended to assume, the risk of mistake for which otherwise he would be entitled to rescission and consequent restitution."

43. For a general discussion of negotiation in a mediation forum and mediation strategies, *See* D KOLB, THE MEDIATORS (1983).

44. D. DOBBS, LAW OF REMEDIES § 11.10 at 773 (1973.)

45. GOLDBERG, GREEN, AND SANDER, DISPUTE RESOLUTION 115 (1985), *quoting* GOLDBERG AND TAYLOR, MEDIATION 244-50 (1984). A mediated agreement can be conducted as a check on the fairness of the agreement. Nevertheless, a court may reach a different outcome if presented with the issue.

[T]he owner of land, who settles a boundary dispute by conveying acreage, without regard to the true boundary line, assumes the risk that had he litigated . . . he would have kept more land. He has made no mistakes, since he knew this all along."[46]

No relief is available for mistakes for which the parties have knowingly and voluntarily assumed the risk.[47] Settlements should bind the parties even if they later discover mistakes in judgment or calculations upon which they relied in forming the mediated agreement.

6. *Impossibility*

The enforcement of mediated agreements may be subject to attacks based on the defense of impossibility if circumstances have significantly changed since the agreement's formation so as to make the basic purpose of the mediated agreement unachievable.[48] The general rule of impossibility excuses performance when conditions that could render performance impossible were not allocated during the bargaining process.[49]

A divorce medition session, for example, produces an agreement in which the mother agrees to grant custody of a child to the father and pay child support of a specified monthly sum until the child reaches the age of majority. If the mother subsequently loses her job, she may breach the child support agreement. If her former husband sues for breach, she can attempt to assert the impossibility defense. The trier of fact could determine that the mother assumed the risk that she might lose her job. The fact alone that circumstances have changed does not foreclose the possibility that the disputants allocated the benefits and burdens of the decision in the bargaining process. Contract rules excuse performance based upon impossibility "only where circumstances indicate risks were unassigned."[50]

In sum, since mediated agreements are contracts, special attention may be required to insure that they meet the requirements of enforceable contracts. However, even when a mediated agree-

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46. *See supra* note 44, at 773.

47. *Id.* at 774.

48. *See* J. CALAMARI & J. PERILLO, *Contracts* § 13-8 (2d ed. 1977); 3 CORBIN ON CONTRACTS §§ 597-605 (1960); 17 AM. JUR. 2d *Contracts* §§ 406-423 (1964).

49. *See* RESTATEMENT (SECOND) OF CONTRACTS § 225 (non-occurance of a condition excuses performance); 6 CORBIN ON CONTRACTS §§ 1321-33 (1962); 17 AM. JUR. 2d *Contracts* § 404 (1964).

50. Goetz & Scott, *supra* note 22, at 586.

ment satisfies the requisites of a contract, other barriers may threaten its enforceability.

III. ENFORCING CONTRACTUAL PROMISES

Parties are likely to become embroiled in a dispute because they believe another owes them a duty, and has breached that duty, causing them harm. Upon the breach of one party's duty, the law seeks to compensate the injured party.[51] The court may order compensatory damages in the form of a monetary payment or performance of an act. In a mediation session, disputants fix their own compensatory damages for the perceived liability from a breach. Opponents of mediation may attack it as an opportunity for parties to exaggerate their damages and obtain significantly more than if a court fixed the damage award.

A. *Overcompensation or Penalities May be Unenforceable*

Contracting parties may stipulate a formula for damages in anticipation of a possible breach, in addition to promising to pay money or perform some act. The formula, called a liquidated damages clause, "will afford damages to the non-breaching party even where he is unable to prove exactly what his damages may be."[52] Stipulating damages in this way enables parties to fix the amount of anticipated damages upon breach by a party.

A liquidated damages clause is created at contract formation, prior to any breach. Only if the mediated agreement contains a liquidated damages clause (to specify compensation if the mediated agreement is breached) will the clauses be subject to enforcement limitations placed on such clauses.[53] Courts will enforce the terms of a liquidated damages clause[54] unless the clause provides for a damage award that is "unreasonably disproportionate to antici-

51. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981); 22 AM. JUR. 2d *Damages* §§ 45-47 (1964).

52. D. DOBBS, *supra* note 44, § 12.5, at 821.

53. Examples of mediated agreements containing liquidated damage clauses are: "I, X, agree to pay $200 to Y, in exchange for Y's giving up any potential litigation arising from this transaction, and if I do not fulfill my obligation I will pay Y $5 for every day I am late" (resolution: X promises to pay, Y promises some act; liquidated damages: X promises to pay); "I, X, agree to pay $200 to Y, in exchange for Y's giving up any potential litigation arising from this transaction, and if I do not, I will deliver the color television which ownership is disputed" (resolution: X promises to pay, Y promises some act; liquidated damages: X promises some act.")

54. D. DOBBS, *supra* note 44.

pated losses." Courts consider such disproportionate compensation an illegal penalty.[55]

Whether a court will characterize a liquidated damages clause as a penalty depends not only on the reasonableness of the damage figure, but also on the difficulties of ascertaining actual damages in the transaction. The more difficult it is to specify the amount, the more likely a court is to enforce the parties' damage agreement.[56] Mediation tends to involve disputed liability and damage amounts, thus a liquidated damages provision embodied in a mediated agreement will be viewed less often as a penalty than a similar clause in a traditional contract. Courts prefer to uphold negotiated damage agreements, and the liquidated damages clause contained therein,[57] because "the very existence of a freely negotiated agreed damages provision is compelling presumptive evidence that it constitutes the cost-minimizing alternative. . . ."[58]

Mediating parties, however, can elude to the "forbidden compensation" issue by setting the amount of damages for a breach after the breach occurs. If the parties mutually agree that a certain amount compensates the harmed party and satisfactorily resolves their dispute, that damage amount will not be subject to attack as a penalty. Of course, it may be more difficult for the parties to agree on an appropriate damage relief after breach.

Some commentators have challenged the assumption that parties are overcompensated when they use a liquidated damages formula. If this argument prevails, an otherwise unenforceable mediated contract in which the formula for damages is based on subjective criteria will be enforced. The basis for allowing enforcement is that the parties know best what adequately compensates them, and that the best resolution is one which results from a freely bargained exchange.[59]

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55. D. DOBBS, *supra* note 44, § 12.5 at 831.

56. Dunbar, *Drafting the Liquidated Damage Clause—When & How*, 20 OHIO ST. L.J. 221, 232, (1959).

57. Waggoner v. Johnston, 408 P.2d 761, 770 (Okla. 1965), *cited in* Goetz & Scott *supra* note 22, at 593, n.104.

58. Goetz & Scott, *supra* note 22, at 586.

59. If the law requires that the breacher of even a freely-entered and fairly-bargained for agreement only pay the provable damages, this fails to compensate the nonbreacher for unprovable values. Goetz & Scott, *supra* note 22, at 555. The "subjective and nonmonetary terms," *see* Schultz, *supra* note 27, at 215, are often held dear and are determinedly bargained for during the mediation. Any judicial remedy for broken mediated contracts ignoring such terms would not only be incomplete, but would also allow the breacher to retain all the advantages of the breach, Geotz & Scott, *supra* note 22 at 562-68.

The courts should not judge the reasonableness of damages set by the mediating parties to resolve their dispute, if damages are not calculated using a liquidated damages clause. If the mediated agreement contains an extravagant liquidated damages figure, the breacher should not be able to simply argue "the amount is too large, so therefore it's an illegal penalty" to prevent enforcement. Since the breaching party previously agreed to the damage award, he would have to raise other contractual arguments, such as fraud, coercion, or undue influence, to render the mediated agreement unenforceable.

B. *Enforcement Concerns with Agreements Involving Promises to Pay Money*

A party seeking to enforce a mediated agreement that contains a promise to pay money will have to establish all the elements of a valid contract. After the enforcing party establishes a valid contract and secures a judgment against the breacher, the enforcing party still faces difficulties in collecting the promised money. The enforcing party must attend an execution hearing and present evidence of the breaching party's assets, attach proceeds from a judicial sale of the payor's property, face probable uncollectibility of payment, and pay attorney's fees for all of the collection activities.

If the enforcing party cannot establish a per se valid contract, then the nonbreacher will be prohibited from relying on the mediated agreement as a basis for automatic relief. The court may nonetheless find that the nonbreacher suffered a harm which requires compensation, and may order enforcement of the promise to avoid injustice.[60]

C. *Enforcement Concerns of Agreements Involving Promises to Perform An Act*

If the mediating parties resolve their dispute by promising to perform an act[61] and the act is not performed as promised, the nonbreaching party may sue to enforce the mediated agreement. If the agreement meets all the requirements of an enforceable contract, the question arises whether the court will require the recalcitrant party to perform the act promised rather than award monetary

60. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

61. Even if the chief promises all involve promises to pay money, if the parties agree to do some act if the money is not paid, that part of the agreement is subject to the liquidated damage clause limitations.

damages for the breach.

Performance of an act, as opposed to payment of money, is classified in the law as an equitable remedy.[62] A party requesting the court to order an equitable remedy must show the necessity of such a remedy, since courts prefer to limit their orders to payment of money. A party making the request must prove that there are no "adequate damages at law,"[63] meaning that money alone will not adequately redress the breach.[64] If a money award is deemed insufficient, the court may order a "specific performance" remedy.[65]

Mediated agreements requiring performance of an act often compel specific performance because of circumstances surrounding the agreement, for instance if monetary damages are difficult to prove.[66] A mediated agreement to allow a parent to visit a child on weekends does not have an easily ascertainable price tag, and money is an inadequate substitution for performance. The act is the only compensation possible.

Though courts have invoked the remedy of specific performance, section 366 of the Restatement (Second) of Contracts and common law doctrines[67] may limit its use. If specific performance would impose on the court burdens of enforcement or supervision disproportionate to the benefits gained from granting specific performance, the court can deny granting the remedy.[68] Nevertheless, this rule has not stopped courts from rendering detailed and complex rulings, for instance, in disputes involving government agency actions, prison reforms, school desegregation, mental hospital practices, bankruptcies, and trusts.[69]

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62. D. DOBBS, *supra* note 44, at § 2.1.

63. *Id.* §§ 2.1, 12.2

64. *Id.* at 58.

65. RESTATEMENT (SECOND) of CONTRACTS § 359(1) (1981) provides: "Specific performance or an injuction will not be ordered if damages would be adequate to protect the expectation interest of the injured party." Section 362 provides that neither relief will be ordered "unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order."

66. Schultz, *supra,* note 27, at 215 n.23. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981); 5A CORBIN ON CONTRACTS § 1142 (1964).

67. *See* D. DOBBS, *supra* note 44, at § 2.5; 5A CORBIN ON CONTRACTS § 1171 (1964).

68. Professor Farnsworth lists limitations (beyond the inadequacy at law requirement) on granting specific performance as "indefiniteness of terms, insecurity as to the agreed exchange, difficulty in enforcement or supervision, unfairness, and public policy." FARNSWORTH, *supra* note 16, at § 12.7.

69. Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation,* 93 HARV. L. REV. 463 (1980).

Denying equitable remedies when an adequate remedy at law is available has rarely barred specific performance requests when family dispute settlement agreements are breached.[70] In *Buswell v. Buswell*, B. J. Buswell, a divorced husband, agreed in a separation agreement to name his children as beneficiaries of his life insurance policy.[71] When Mr. Buswell borrowed on the policy and made his second wife its beneficiary, the court compelled him to restore the policy to its unencumbered state and reinstate the children as beneficiaries.[72]

Likewise, New York's highest court specifically enforced a couple's antenuptial agreement, which compelled the defendant husband to seek the advice of rabbinical authorities before finalizing a divorce.[73] Specific performance has been denied, however, when one spouse requested enforcement of the other spouse's agreement to move out of the city and never return,[74] or when an agreement depended on the consent of a third party.[75]

The pattern of specifically enforcing family dispute settlement agreements may stem from a belief that family matters, especially family disputes, are best handled by those best able to weigh the equities involved in the situation. Or perhaps the pattern is generated by recognizing that there is no adequate economic remedy at law to settle family problems. In any event, re-examination of legal standards prohibiting specific enforcement may be in order.[76]

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70. *See generally* Annot., 44 A.L.R. 2d (1955) Section 1 states that United States courts have generally taken the view that when a separation agreement (whether mediated or not mediated) provision is breached, specific performance may be granted where the breached provision is fair, not against public policy, the breach resulted in injury, and an adequate remedy by way of an action at law is lacking.

71. Buswell v. Buswell, 377 Pa. 487, 105 A.2d 608 (Pa. 1954).

72. *Id.*

73. Avitzur v Avitzur, 58 N.Y.2d 108, 446 N.E.2d 136, 459, N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983).

74. Martin v. Martin, 5 A.D.2d 307, 172 N.Y.S.2d 636 (1958) (denying specific performance on the grounds that petitioner had not sustained any legal damage).

75. Casady v. Modern Metal Spinning & Mfg. Co., 188 Cal. App. 2d 728, 10 Cal. Rptr. 790 (1961).

76. For a persuasive argument advocation expansion of specific performance availability, *see* Schwartz, *The Case for Specific Performance*, 89 YALE L. J. 271, 305-06 (1979) which concludes the following:

> . . . [A] promissee to a breached contract is entitled to a damage award as of right. . . Because specific performance is a superior method for achieving the compensation goal, promisees should be able to obtain specific performance on request. An expanded specific performance remedy would not generate greater transaction costs than the damage remedy involves, nor would its increased use interfere unduly with the liberty interests of pro-

Professor Dobbs has noted that, although few cases have addressed whether disputants may contractually agree to specific performance in the event of breach,[77] "if the legal remedy is... either clearly adequate or clearly inadequate, perhaps an agreement for specific performance ought to be given special weight, ... even if the legal remedy is quite adequate by traditional standards."[78] Traditional contract doctrines adequately safeguard against abuse of the mediation process.

D. *Other Enforcement Mechanisms*

The United States Supreme Court has held that consent orders may be construed as contracts for enforcement purposes.[79] Disputants who become parties to a mediated agreement may want to structure the agreement as a consent decree.[80]

Two federal government agencies that commonly use the consent decree device to insure enforcement of their mediated agreements are the Equal Employment Opportunity Commission (EEOC) and the Environmental Protection Agency (EPA). Common provisions of EEOC conciliation agreements require such actions as forbearing lawsuits, reinstating employees and expunging un-

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misors. Making specific performance freely available also would eliminate the uncertainty costs of planning and litigtion created by the difficulty of predicting whether the remedy will be available. In addition, this reform would reduce the negotiation costs incurred by parties in attempting to create forms of contractual specific performance such as liquidated damage clauses. Further, defenses to request for specific performance that rest on unfairness of contract terms or prices and that differ from the defenses in actions at law should be eliminated; the grounds for denial of specific performance should be the same as those that now will bar a damage suit. Finally, the defense based on difficulty of supervision should be greatly restricted. If the law is committed to putting disappointed promisees in as good as a position as they would have been had their promisors performed, specific performance should be available as a matter of course to those promisees who request it.

77. D DOBBS, *supra* note 44, § 12.5, at 825.

78. *Id.* In addressing the opposing concern that equity courts only have jurisdiction where the remedy at law is inadequate, he writes:

[I]t is quite certain that equity jurisdiction is not jurisdictional and that courts have used the word 'jurisdiction' only in a loose sense referring to the propriety of equity action and not to the power of equity courts. The argument that one cannot confer jurisdiction by contract, then, seems to have no relevance to this particular problem.

79. United States v. I.T.T. Continental Baking Co., 420 U.S. 223, 236 (1975).

80. Freedman, *supra* note 10, at 14. Consent decrees require the parties to file in court a complaint, answer, and a stipulated judgment or decree approved by the court. 47 AM. JUR. 2d JUDGMENTS § 1089 (1969).

favorable entries from personnel records.[81] These provisions impinge upon the employer's freedom of action and can impose great enforcement and supervisory burdens on the court. Yet, the benefits gained from specific performance of these conciliation agreements prevent the courts from denying specific performance of a mediated contract on grounds of supervisory difficulties.

The EPA's consent decrees commonly require compelled interim relief measures; compelled monitoring and sampling tests with recorded results; and prompt notice of compliance or noncompliance with every requirement of the decree.[82] The EEOC's and EPA's consent decrees are examples of restrictive agreements, and noncompliance with such agreements can be remedied by specific performance. These agencies' conciliation agreements demonstrate that disputants can, within reason, freely agree to a dispute settlement and still expect courts to enforce noncompliance through specific performance.

Consent decrees are not the only avenue available to parties who are already involved in litigation but wish to control the outcome of their case. Parties may achieve substantial reductions in time and enforcement costs by mediating throughout litigation. A trial court has inherent power to supervise and enforce settlement agreements reached by parties to an action that is pending before the court.[83] Enforcement may be by summary judgment,[84] absent a disagreement over the fact of the settlement,[85] or resolution of special circumstances may be sought. Parties may seek to resolve enforcement barriers in an evidentiary hearing before the enforcement action proceeds.[86] Whether the court will summarily enforce an agreement or conduct an evidentiary hearing depends on the nature of the disputed issues.[87]

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81. *Procedures Precedent to a Conciliation Conference*, EEOC COMPLIANCE MANUAL (BNA) No. 24, at 62:0011 (March 1979).

82. D. Riesel, *Negotiation and Settlement in Environmental Litigation* (1983) (unpublished work presented to participants in the negotiation course for environmental professionals by American Arbitration Association and Environmental Law Institute, Washington, D.C.).

83. Dankese v. Defense Logistics Agency, 693 F.2d 13, 16 (1st Cir. 1982) *(citing* Autera v. Robinson, 136 U.S. App. D.C. 216, 419 F.2d 1197, 1200 n. 10 (1969)).

84. National Lawyers Guild v. Attorney General, 94 F.R.D. 592 (S.D.N.Y. 1982).

85. Bergstrom v. Sears, Roebuck & Co., 532 F. Supp. 923 (D. Minn. 1982).

86. Mid-South Towing Co. v. Har-Win, Inc., 733 F.2d 386 (5th Cir. 1984).

87. *Id.* (citing Millner v. Norfolk & Western Railway Co., 643 F.2d 1005, 1009 (4th Cir. 1981); Kukla v. National Distillers Products Co., 483 F.2d 619 (6th Cir. 1973).

Summary enforcement is predicated on the theory that: 1) a settlement agreement voluntarily entered into by the parties to a lawsuit constitutes a binding contract,[88] and 2) an agreement to settle a claim is enforceable like any other contract.[89] Compromise settlements, although generally governed by contract principles, also have attributes of judgments in that they are "decisive of the rights of the parties and serve to bar reopening of the issues settled."[90]

Courts often retain inherent jurisdiction to enforce settlement agreements even if the case has been dismissed with prejudice.[91] When parties stipulate to settle an action, the reasoning is that they consent to exercise of the court's power to compel compliance.[92] Many courts have exercised such "inherent jurisdiction" without requiring an independent basis of subject matter jurisdiction[93] by allowing the enforcing party to file a motion to vacate the dismissal order under Federal Rule of Civil Procedure 60(B).[94] Nonetheless, the surest way to safeguard enforcement jurisdiction is to incorporate the settlement terms into the record of the proceedings.[95]

CONCLUSION

Enforcement concerns should not prohibit treating mediated agreements like traditional contracts. Mediation can create an en-

88. Mack v. Polson Rubber Co., 14 Ohio St. 3d 34, 470 N.E. 2d 902 (1984); Spercel v. Sterling Industries, Inc., 31 Ohio St. 2d 36, 285 N.E.2d 324 (1972).

89. Fustok v. Conticommodity Service, Inc. 577 F. Supp. 852, 858 (S.D.N.Y 1984).

90. Gorman v. Holte, 164 Cal. App. 3d 984, 211 Cal. Rptr. 34, 37 (1985).

91. Ozyagcilar v. Davis, 701 F.2d 306, 308 (4th Cir. 1983); Debose v. Mueller, 552 F. Supp. 307 (N.D. Ill. 1982).

92. Cooper-Jarrett, Inc. v. Central Transport, Inc., 726 F.2d 93 (3rd Cir. 1984) *But cf.* Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180, 1190, n.13 (8th Cir. 1984) (there is no authority for use of contempt proceeedings to enforce a court-approved settlement where its terms have not been incorporated into a court order, decree, or judgment).

93. Fox v. Consolidated Rail Corp., 739 F.2d 929, 932 (3rd Cir. 1984) (citing Arco Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862, (1976). *But cf.* Fairfax Countywide Citizens Ass'n v. County of Fairfax, 571 F.2d 1299 (4th Cir. 1978) (when settlement is not contained in district court's order dismissing original action subsequent enforcement suit filed in same court requires an independent jurisdictional basis). *Accord* Musifilm B.V. v. Spector, 568 F. Supp. 578 (S.D.N.Y. 1983).

94. VanLeeuwen v. Farm Credit Admin., 600 F. Supp. 1161, 1164 (D. Or. 1984) (*citing* Arco Corp. (1976)).

95. *See* Gardiner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984); Seymour v. City of Eau Claire, 112 Wis. 2d 313, 332 N.W.2d 821 (1983) (settlement needs to be incorporated into the final judgment); Ohio State Tie & Timber Inc. v. Paris Lumber Co., 8 Ohio App. 3d 236 (1982).

forceable contract that will qualify an aggrieved party for an award of damages or specific performance upon breach. At the time of formation, special attention should be paid to the following areas of concern in order to establish all of the elements of a traditional contract: 1) ensuring a balanced negotiation so that undue influence, coercion and fraud do not taint the agreement; 2) ensuring that each party has a good faith belief in all claims or defenses; 3) ensuring that the rights of parties not included in the agreement are not infringed, and 4) ensuring that the liquidating damages clause does not penalize the breaching party.

Even if a specific agreement does not live up to all the traditional requirements of court enforceable contracts, disputes may still be resolved by mediation. Carefully constructed agreements incorporate incentives for accomplishing compliance, although the threat of later resort to judicial coercion may be forfeited as a bargaining chip. Mediation's goal is to allow the disputants to resolve their problem and comply with their resolution. The challenge is to construct a mediated agreement that either the courts or the parties will enforce.

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